IN THE

Supreme Court of the United States

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Office-Supreme Court, U.S.
FILED
MAY 14 1962
JOHN F. DAVIS, CLERK

October Term, 1961.
No. 813

J. ELROY McCAW and JAMES A. WOOTEN,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,
Respondent,

UNION BANK, a corporation,
Real Party in Interest.

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Petitioners seek certiorari with respect to four questions which they claim involve "important questions of Federal law" requiring determination by this Court. [Petition, p. 2.]* As we shall see, none of the ques-

*The certiorari is sought to be directed to the California Supreme Court. Since that court merely denied a petition for hearing after a decision by the District Court of Appeal, it is not the proper court to which certiorari should be directed. The proper court is the District Court of Appeal. [*Hammerstein v. Superior Court*, 341 U. S. 491, 492 (1951).]

tions are "of substance" in the sense that this Court's power of discretionary review is warranted.

The elementary teaching of Rule 19 of this Court's rules is that there must be "special and important reasons" for the exercise of this Court's discretionary review power. That standard implies "a reach to a problem beyond the academic or the episodic". [*Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955).] There is nothing in the Petition showing grounds of such importance—as distinguished from importance to the litigants. Indeed, the most that petitioners assert is that the questions have not been previously decided by this Court and that, therefore, grounds exist for the granting of the Petition. [Petition, pp. 13-14.] Many intellectually interesting questions of law have not been decided by this Court. But that alone does not make the questions appropriate for decision by this Court. Each of the questions asserted by petitioners involves elementary principles of law. Each is well-settled and requires no further determination by this Court.

Moreover, the alleged Federal questions were not raised in a timely manner below and accordingly are not appropriately presented to this Court for review. This Court "is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law . . ." [*Eckman v. California*, 344 U. S. 357, 358 (1953).]

Questions Presented.

1. Does the California procedure allowing a dismissal of a petition for a writ of mandate, without first issuing an alternative writ of mandate, deny petitioners the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States?

2. Does the construction by the California courts of the scope of a contractual consent to jurisdiction provision so as to include actions for fraud as well as actions in contract deprive petitioners of their rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States?

3. Did California deny petitioners due process of law under the Fourteenth Amendment to the Constitution of the United States by not affording ample time to appear and defend an *in personam* action brought against them in the California courts?

4. Were petitioners deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States by enforcing the covenants of a contract, to which petitioners were parties, providing that petitioners consented to the jurisdiction of the courts of California and stipulating the manner of effecting service upon them?

Counter-Statement of the Case.

A. The Proceedings Below.

1. *The Nature of the Action in the Trial Court.*

The action below was brought by Union Bank, the Real Party in Interest in this proceeding, against petitioners on three causes of action. The First Cause of Action, for declaratory relief, is on certain guaranties and agreements to purchase accounts receivable. The guaranties and agreements were executed by the petitioners in favor of Union Bank in connection with certain loans made by Union Bank to Aloha Corporation, a Colorado corporation, doing business as National Sales Research Company. The Second Cause of Action is on a promissory note executed by the petitioners in favor of Union Bank in the amount of $50,000.00. The Third Cause of Action asserts a claim based on a civil conspiracy, to which petitioners were parties, to defraud Union Bank in connection with the aforesaid loans to Aloha Corporation.

2. *The Service of Process Below.*

The complaint was filed on September 5, 1961. On the same date, copies of the summons and complaint were duly served on Bertram H. Ross, Esquire, of Los Angeles, California, as the designated agent of petitioners for service of process in the State of California. [Declaration of Bernard Reich, Ex. 3 to Answer to Petition for Writ.] On the same date, copies of the summons and complaint were also sent by registered mail to each of the petitioners at his home address outside the State of California. [Affidavit of Howard L. Friedman, Ex. 4 to Answer.]

The aforesaid service was accomplished pursuant to and in conformity with the provisions of paragraph 20 of a written contract dated April 9, 1961, to which McCaw and Wooten are parties. [Ex. B to the Complaint.] The pertinent provisions are quoted in the Petition herein at pages 4-6.

The foregoing provisions of the contract require a dual service; (1) service upon the designated agent (or one of the other methods of service specified in the agreement); (2) service by registered mail upon the petitioners. Service under the contract was not completed until both services were made. Accordingly, the final act of service was performed outside the County of Los Angeles when copies of the summons and complaint were received by the petitioners at their respective addresses.

3. *The Motion to Quash Service of Summons in the Trial Court.*

Petitioners moved in the trial court to quash the service of the summons on the ground that the trial court had no jurisdiction over the persons of the petitioners and, in the alternative, to dismiss the Third Cause of Action on the same ground. [Ex. 2 to the Answer to Petition.] On October 13, 1961, the trial court entered a minute order denying the motion in its entirety.

4. *The Petition for Writ of Mandate in the District Court of Appeal.*

Petitioners sought a writ of mandate from the District Court of Appeal, Second Appellate District, State of California, commanding the respondent court to quash the aforesaid service of summons or, in the alternative, to dismiss the Third Cause of Action. Said

petition did not attach as exhibits or otherwise any part of the record made in the trial court. However, the real party in interest, in its answer to said petition, attached as exhibits thereto the complaint in the trial court [Ex. 1], the motion to quash or to dismiss [Ex. 2], the declaration of Bernard Reich in support of the motion [Ex. 3], and the affidavit of Howard I. Friedman in opposition to the motion to dismiss or quash. [Ex. 4.] Said exhibits comprise substantially the entire record before the trial court, and said exhibits were before the District Court of Appeal in connection with its consideration of the petition. Petitioners filed with said petition for writ of mandate a memorandum of points and authorities in support thereof, which fully briefed the merits of said petition. The real party in interest filed with said District Court of Appeal a memorandum of points and authorities thoroughly briefing the opposition to said petition for writ of mandate. With the foregoing briefs and trial court record before it, the District Court of Appeal, on December 2, 1961, entered its order denying the petition for writ of mandate. The District Court of Appeal did not issue an alternative writ of mandate prior to its denial of said petition.

5. *The Petition for Hearing in the California Supreme Court.*

Petitioners sought a hearing before the California Supreme Court. On November 29, 1961 said Court denied a hearing.

B. The Manner in Which the Alleged Federal Questions Were Raised Below.

1. *The Equal Protection Question.*

The claim that the California courts have in effect denied the right of review to petitioners in violation of the equal protection clause of the Fourteenth Amendment could not and was not raised in the trial court. The claim stems from the denial by the District Court of Appeal of the petition for writ of mandate without first issuing an alternative writ. [Petition, p. 14.] Under California practice, the asserted Federal question could not have been and was not raised in the District Court of Appeal by way of a motion for rehearing because such a motion does not lie under such circumstances. [Rules 24(a) and 27 of the Rules on Appeal.] Accordingly, the first opportunity available to petitioners for raising the asserted Federal question was in their petition for hearing by the Supreme Court of California. In said petition, petitioners asserted that they were "entitled as a matter of statutory right to the alternative writ". [Petition for Hearing, p. 10.] They relied upon California statutory provisions and judicial decisions in making said contention. The only reference to a constitutional right to an alternative writ was contained in the statement that "serious constitutional questions would arise if petitioners were not entitled to full review of the order of Respondent." [*Id.* at 10.] There is nothing in said petition for hearing by the state Supreme Court identifying the character of the "constitutional question" or, for that matter, any

identification of whether or not the constitutional question would arise under the California Constitution or the Constitution of the United States. Of course, no Federal question is raised by an allegation of "unconstitutionality" that fails to invoke expressly the Constitution of the United States. [*Kipley v. Illinois*, 170 U. S. 182 (1898).] The first time that petitioners identified the precise character of the constitutional question occurred in their Petition for Certiorari in this Court where they declared that the action of the District Court of Appeal in denying the alternative writ constituted a discriminatory application of the right of appeal which had the effect of depriving them of the equal protection of the laws under the Fourteenth Amendment.

2. *The Claim That Petitioners Have Not Consented to California Jurisdiction in Tort Actions.*

In the trial court, petitioners claimed that the contractual consent provision did not embrace the subject matter of the Third Cause of Action, which is a claim for fraud. There is nothing in their Motion to Quash as filed in the trial court or in the supporting memorandum of points and authorities suggesting that a Federal, or for that matter a State, constitutional question was involved.

Similarly, in their petition for a writ of mandate in the District Court of Appeal, petitioners again rested their contentions and their claim with respect to the Third Cause of Action upon the assertion that the contractual consent did not embrace the subject matter of said cause of action. [Petition for Writ of Mandate, pp. 8-11.] There is nothing in said petition or in the supporting memorandum of points and authorities sug-

gesting that constitutional questions arising under the Constitution of the United States were involved.

In the petition for hearing by the Supreme Court of California, the same pattern emerges. Petitioners again claimed that the scope of the contractual consent provision did not embrace the subject matter of the Third Cause of Action. It was not suggested that constitutional questions arising under the Constitution of the United States were involved. [Petition for Hearing, pp. 17-20.]

It was not until petitioners filed their Petition for Certiorari in this Court that they asserted with clarity that the assumption of jurisdiction of the Third Cause of Action deprived them of rights under the Fourteenth Amendment to the Constitution of the United States. [Petition, p. 14.]

3. *The Question of Adequate Notice to Appear and Defend.*

In the trial court, petitioners claimed that they were afforded only ten days within which to appear and defend the action and asserted that a ten day period was not sufficient time to satisfy "the constitutional objective of due process." Again petitioners did not identify whether or not the constitutional requirement stemmed from the California Constitution or from the Constitution of the United States. The cases upon which petitioners relied in the trial court with respect to this question included decisions of this Court.

In their petition for a writ of mandate in the District Court of Appeal, petitioners claimed a violation of their "constitutional rights". [Petition for Writ of Mandate, para. 8.] They argued further that they were a-

forded only a ten day period to appear and defend and asserted that said period was not sufficient to meet the requirements of due process. Petitioners again failed to identify whether the asserted constitutional question stemmed from the California Constitution or the Constitution of the United States.

In their petition for hearing by the state Supreme Court, petitioners proceeded on exactly the same theory as in the District Court of Appeal and again failed to identify the constitutional question involved with respect to the United States or California Constitutions. [Petition for Hearing, pp. 12-16.]

In their Petition for Certiorari, for the first time, petitioners clearly identified the Fourteenth Amendment to the Constitution of the United States as being the basis for the asserted constitutional question. [Petition, p. 20.]

4. *The Question of the Validity of a Contractual Consent to Jurisdiction Provision.*

In the trial court, petitioners made no constitutional argument whatever with respect to the validity of the contractual consent provisions and the manner of effecting service thereunder. The claim in the trial court was that such a contractual provision "is against the public policy of the State of California."

In their petition for a writ of mandate in the District Court of Appeal, petitioners claimed that "their constitutional rights" were violated [Petition, para. 8] but failed to identify which Constitution—California or the

United States—was involved. In their attack upon the contractual consent provisions, they again urged that the provisions were invalid as a violation of "the public policy of the State of California" [Memorandum of Points and Authorities, p. 2.]

The same position was taken by petitioners in their petition for hearing by the California Supreme Court in which petitioners asserted that "it is against the public policy of the State of California for the Courts of this State to assert jurisdiction over non-residents simply because of their prior consent." [Petition for Hearing, p. 10.]

It was not until their Petition for Certiorari in this Court that petitioners raised clearly the claim that a contractual consent to jurisdiction violated petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

There Is No Colorable Substance to the Claim That Petitioners Have Been Denied the Equal Protection of the Law as a Consequence of the Decision of the District Court of Appeal Denying Their Petition for a Writ of Mandate Without First Issuing an Alternative Writ of Mandate. Accordingly, There Are No Special or Important Reasons Justifying the Exercise by This Court of Its Power of Discretionary Review With Respect to That Question.

Under California practice, an order denying a motion to quash service of summons and process is normally reviewable by an application for a writ of mandate addressed to an appropriate appellate court. [Cal. Code Civ. Proc., §416.3]. A petition for a writ of mandate is considered an original proceeding in the appellate court and is governed by the provisions of California Code of Civil Procedure, §1084 *et seq.* and by Rule 56 of the Rules on Appeal. The alternative writ of mandate has the effect of an order to show cause why a peremptory writ should not be granted, and normally provides a return date for the hearing on the peremptory writ. [*Id.* §1087].* The peremptory writ may be issued in the first instance or it may be preceded by the issuance of the

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*Section 1087 provides:

"The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return-day inserted."

alternative writ. [*Id.* §1088.] Moreover, it is well established in California practice that the writ may be denied without the issuance of the alternative writ. [*E.g., Funeral Dir. Ass'n v. Bd. of Funeral Dirs.*, 22 Cal. 2d 104, 136 P. 2d 785 (1943); *Trabue Pittman Corporation v. Board of Supervisors*, 49 Cal. App. 2d 463, 121 P. 2d 746 (1942); *Tingley v. Superior Court*, 8 Cal. App. 47, 48, 96 Pac. 20 (1908); Rule 24(a) of Rules on Appeal.]

In either event, the Court will have had before it the petition, a supporting brief and such opposition papers as the respondent and the real party in interest may desire. The denial without issuance of the alternative writ may be motivated by the Court's conviction that the petition is without merit or that a proper case for the exercise of the discretion inherent in the Court has not been presented or that the petitioner has failed to provide in the petition an adequate record disclosing the proceedings in the trial court, or that the petitioner has not justified his commencement of the mandate proceedings in the particular appellate court selected. [*E.g. Funeral Dir. Assn. v. Bd. of Funeral Dirs.*, 22 Cal. 2d 104, 136 P. 2d 785 (1943).] Assuming that the denial is motivated by a determination that the petition is without merit, the only practical difference between a denial of the petition before issuance of the alternative writ and a denial after issuance of the alternative writ is that, in the latter case, oral argument on the merits normally occurs. In either instance, there has been appellate review and an opportunity for the appellate court to consider the matter fully on its merits.

As we have seen, the District Court of Appeal, with a full record before it, denied the petition for a writ o

mandate. It did so without first issuing an alternative writ of mandate. Petitioners insist that said denial deprived them of the right of appellate review, thereby compromising their constitutional rights. [Petition, p. 12.] They ignore the fact that the issuance of the alternative writ under California practice is not a condition of the existence of the right of review. The review was afforded in connection with the denial of the petition, irrespective of the alternative writ. The gravamen of petitioners' complaint is that the California Courts, by not issuing an alternative writ, have deprived them of the opportunity for oral argument. The fact that California has indeed provided petitioners with appellate review is the complete answer to petitioners' claim; but, as we shall now see, even if the denial of the alternative writ were construed as having the effect of denying petitioners review, no constitutional question would be presented.

A. Due Process of Law Does Not Require California to Provide Appellate Review.

It is elementary that due process "does not comprehend the right of appeal" [*District of Columbia v. Clawans*, 300 U. S. 617, 627 (1937); see also *National Union of Marine Cooks v. Arnold*, 348 U. S. 37, 43 (1954); *Reetz v. Michigan*, 188 U. S. 505, 508 (1903); *McKane v. Durston*, 153 U. S. 684, 687 (1894)]. It is equally familiar that due process does not require California to allow oral argument to petitioners in connection with any appellate review which it might make available to them. [*Price v. Johnston*, 334 U. S. 266, 285 (1948)].

B. California Has Not Discriminated Against Petitioners With Respect to the Availability of Appellate Review.

We recognize, of course, the principle that, while appellate review need not be made available by a State, the State must make it available on a nondiscriminatory basis if it makes appellate review available at all. [*E.g., Smith v. Bennett*, 365 U. S. 708 (1961); *Burns v. Ohio*, 360 U. S. 252 (1959); *Griffin v. Illinois*, 351 U. S. 12 (1956); *Dowd v. United States*, 340 U. S. 206 (1951)]. That California has done. There is no showing whatever that the California procedure with respect to petitions for writ of mandate does not operate in the same manner for all persons similarly situated. If all persons in California situated similarly to petitioners are treated the same with respect to the procedural rules governing petitions for writ of mandate, the constitutional requirement is satisfied. [*Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist.*, 281 U. S. 74, 81 (1930).] The fact that, procedurally, a petition for a writ of mandate is treated as an original proceeding in the appellate court and may be denied without the issuance of an alternative writ of mandate or an order to show cause—in contrast to procedure governing other types of appellate review in different cases—does not constitute an unreasonable classification. The Fourteenth Amendment does not require a State to "adopt a unifying method of appeals . . ." [*Ibid.*]

Petitioners contend that the decision below conflicts with *Griffin v. Illinois*, 351 U. S. *supra*, and *Dowd v. United States*, 340 U. S. *supra* [Petition, p. 13]. The contention reveals a gross misapprehension of the teaching of those cases. *Griffin* involved no more than a determination that the administration of the Illinois statute governing availability of trial court transcripts

in non-capital felony appeals made it impossible, as a practical matter, for indigent appellants to secure appeal. In short, *Griffin* stands for the proposition that a State may not provide appeal for those who can afford it and deny appeal to those who cannot. The same principle is found in *Smith v. Bennett*, 365 U. S. *supra*, and *Burns v. Ohio*, 360 U. S. *supra*. *Dowd v. United States*, 340 U. S. *supra*, also involved a discriminatory denial of the right to appeal in which state prison authorities prevented a prisoner from sending out appeal documents until it was too late to take a proper appeal. The holding was that Indiana in that case had prevented respondent from resorting to the type of appeal generally afforded by Indiana to persons convicted of crime.

The record here is silent and petitioners are silent in spelling out the elements of discrimination in the California practice of which they complain. That silence is fatal to their contention that California has denied them the equal protection of the law.

C. The Constitutional Question Assertedly Involved Was Not Raised in a Timely Manner Below.

It was of course incumbent upon petitioners to assert their claim of unconstitutional State action in the California courts at the earliest opportunity. [*E.g.*, *Johnson v. New York Life Insurance Co.*, 187 U. S. 491, 495 (1902).] Their first opportunity to do so occurred in their petition for a hearing in the California Supreme Court. As we have seen, that petition asserted that petitioners were entitled "as a matter of statutory right" to the issuance of an alternative writ. [Petition for Hearing, p. 10.] The only hint at a constitutional question was their statement that "serious constitutional questions would arise" if pettitioners

were not entitled to an alternative writ. [*Ibid.*] The failure to identify precisely the character of the constitutional objection and the added failure to identify which Constitution—California or the United States—was involved precludes petitioners from raising the question for the first time in this Court [*E.g. Lawn v. United States*, 355 U. S. 339, 362 (n. 16) (1958)].

II.

The Asserted Constitutional Question Involving the Construction of the Scope of the Contractual Consent to Jurisdiction so as to Include Actions for Fraud Involves Only a Question of a State Court's Decision of Local Law. Such Federal Implications as May Also Be Present Were Not Required to Support the Decision of the State Court and in Any Event Do Not Involve Questions of Such Importance as to Justify the Exercise by This Court of Its Discretionary Power of Review.

Petitioners assume that the contractual consent contained in the April 9, 1961 agreement is limited to "contract" actions. [Petition, p. 16.] On that premise, they contend that California does not have jurisdiction over their persons in connection with the subject matter of the Third Cause of Action because that cause of action sounds in tort, not contract.

First: Paragraph 20 of the April 9, 1961 agreement embraces actions "arising out of any loan or guaranty transaction heretofore made by or between Union and any of the named parties." Whether or not Petitioners consented to California jurisdiction with reference to the subject matter of the Third Cause of Action turns on the construction of the language "arising out of any loan or guaranty transaction." The decision below up-

holding California jurisdiction over the Third Cause of Action could have been based—and indeed we so argued to the California courts—on the construction that the word "transaction" embraces the full factual context of any loan made by the bank to any of the parties, thereby embracing actions both in contract and in tort relating to the same facts. [See *Marr v. Superior Court*, 30 Cal. App. 2d 275, 86 P. 2d 141 (1939); *Kane v. Mendehall*, 5 Cal. 2d 749, 56 P. 2d 498 (1936); Cal. Code Civ. Proc., §427.]. Manifestly, if petitioners, by a fair construction of the document, consented to the jurisdiction of the California courts in connection with the subject matter of the Third Cause of Action, California cannot be charged with having asserted jurisdiction over them in the absence of their consent. Such a construction is dispositive of petitioners' claims in this regard.

The construction of the terms of the April 9, 1961 contract is wholly a question of local law. It is immaterial whether the State court was right or wrong with respect to said determination. An erroneous decision of a question of local law raises no Federal question; and this Court is without power to review such a decision. [*Tracy v. Ginzberg*, 205 U. S. 170, 177-78 (1907); *Central Land Co. v. Laidley*, 159 U. S. 103, 112 (1895); *McDonald v. Oregon Navig. Co.*, 233 U. S. 665, 669-70 (1914).]

Second: If petitioners are properly before the respondent court on the first two causes of action as a consequence of the consent and designation of agent provisions of the contract,* they cannot be heard to

*For purposes of the petition for a writ commanding dismissal of the Third Cause of Action, this is necessarily conceded by petitioners.

complain with reference to the Third Cause of Action, even if the scope of the contractual consent did not embrace the subject matter of that cause of action. Having once been properly brought before the California courts by consent, petitioners, like all other defendants, are subject to the procedural rules adopted by California for civil actions. So long as the Third Cause of Action is properly joinable with the first two causes of action (and petitioners, in effect, concede that, under §427 of the Code of Civil Procedure, it is), the Third Cause of Action cannot be properly dismissed.

The point is illustrated by *Adam v. Saenger*, 303 U. S. 59 (1938). A Texas corporation, not qualified in California, brought suit in California. The defendant filed a cross-complaint and served the attorney for the Texas corporation. Judgment was entered by default in favor of the cross-complainant. The Texas courts dismissed a suit brought on the judgment on the ground that the California courts did not have *in personam* jurisdiction over the Texas corporation and that the service upon the company's California attorney did not confer such jurisdiction. The Supreme Court of the United States reversed and held that the Texas courts had failed to give full faith and credit to the California judgment. The reasoning of this Court is most instructive:

> "There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the juris-

diction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence." [303 U. S. at 67-68.]

See also *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 271-2 (1914) where this Court held that "a State, without violance to the 'due process' clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its Courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the Court for all purposes of the action. . . . ."

By a parity of reasoning, the same conclusion applies here. Petitioners having properly subjected themselves to the jurisdiction of the California courts with reference to the first two causes of action, due process is not offended by imposing upon petitioners the same procedural rules which apply to all civil actions in California. Included among those rules is Section 427 of the Code of Civil Procedure relating to joinder of causes of action.

The principle can be demonstrated most simply by assuming that a voluntary general appearance were made by petitioners in a suit confined to the first two causes of action. It is, of course, axiomatic that a voluntary general appearance by a nonresident confers *in personam* jurisdiction upon the court. [*E.g. Harrington v. Superior Court*, 194 Cal. 185, 228 Pac. 15 (1924); Cal. Code Civ. Proc. §416.] It has never been suggested or held that under such circumstances the plaintiff could not constitutionally amend his complaint thereafter, pursuant to Section 472 of the Code of Civil Procedure, to add a properly joinable Third

Cause of Action. The situation from a constitutional point of view is no different where the appearance is made as a consequence of a contractual consent entered into in advance of the commencement of the action. That is precisely the situation here.

The foregoing involves the application of familiar principles of procedure. No unsettled question of law is presented and, accordingly, no reason appears for review by this court.

Third: As we have already seen, petitioners did not raise the constitutional point sought to be invoked with respect to this reach of the case until they filed their petition in this Court. For reasons already indicated (see pp. 16-17, *supra*) no constitutional question is properly before this Court.

III.

There Is No Federal Question Involved in the Decision of the California Court That Petitioners Were Given Adequate Notice to Appear and Defend the Action. That Decision Can Be Rested on the Wholly State Ground That a Thirty Day Period Was Provided Under California Law Rather Than the Ten Day Period Upon Which Petitioners Rest Their Claim. In Any Event, and Even if a Ten Day Period Were Involved, No Substantial Federal Question Is Raised Warranting the Intervention of This Court Through Its Discretionary Power of Review.

Petitioners contend that they were permitted but ten days under California law to appear and defend the action in the trial court. [Petition, p. 21.] Such period, they say, does not afford reasonable notice to them to

appear and defend; accordingly it impinges upon their rights under the due process clause of the Fourteenth Amendment.

First: We argued in the California courts—and it cannot be assumed that such argument was not the basis of the decision below—that the applicable time period under California law was thirty days rather than ten. Since the California decision could have been predicated upon the availability of a thirty day period, the reasonableness of the time period must be determined in terms of a thirty day period. The California decision with respect to the applicable time period involves a question wholly of local law over which this Court has no review power. Petitioners have not attacked the reasonableness of a thirty day period.

Second: Even if the applicable period within which petitioners are required to defend were ten days instead of thirty, ample notice and opportunity to appear and defend is thereby afforded. Hence, the requirements of due process under the Constitution of the United States are satisfied. Those requirements involve nothing more than affording a defendant reasonable notice of the pendency of an action and ample time within which to appear and defend. [*E.g. Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306, 314 (1950).] Petitioners, in effect, concede that the method of service utilized afforded them actual notice of the proceedings. Their sole attack is based upon the assertion that a ten day period does not provide adequate time to appear and defend. With modern methods of communication and travel, a ten-day period is manifestly sufficient. In any event, it is no more insufficient for a nonresident individual defendant than

for a resident defendant or a nonresident corporate defendant whose agent in California is served. If petitioners are right that the ten-day period is unconstitutional, it must follow that it is unconstitutional in those situations as well. There is nothing in the petition supporting in the slightest such a conclusion either on the basis of controlling authorities or on the basis of reasoned argument.

Third: The sole support for the remarkable contention that a ten-day period is unconstitutional is provided by a tortured reading of *Roller v. Holly*, 176 U. S. 398 (1900) and *Goodrich v. Ferris*, 214 U. S. 71 (1909). [Petition, pp. 21-22.] In *Roller*, this Court held that a five-day period for a Virginia defendant to appear in a Texas action was not sufficient "under the circumstances of this case, and considering the distance between the place of service and the place of return." [176 U. S. at 413.] In *Goodrich*, this Court upheld the ten-day provision provided under the California Civil Code provisions formerly controlling probate administration. This Court, in *Goodrich*, distinguished *Roller*, among other grounds, on the ground that *Roller* involved original process while *Goodrich* did not. Petitioners infer that, had *Goodrich* likewise involved original process, this Court would have held that the ten-day period was unconstitutional. There is not the slightest suggestion in *Goodrich* that a ten-day period in a case involving original process is unconstitutional. Moreover, *Goodrich* in its holding sustains a ten-day period. No case has held or suggested what petitioners contend—namely, that a ten-day period in a case involving original process is unconstitutional. In the absence of such a holding, petitioners' contention collapses.

IV.

The Validity of Contractual Consent to Jurisdiction Provisions Is so Well Established That No Ground Exists for the Exercise by This Court of Its Discretionary Power of Review Over the Decision of the California Court Upholding Said Provisions.

Petitioners concede that the available authorities have upheld the validity of contractual consent provisions such as those involved in this case. [Petition, p. 24.] Their principal contention is that this Court has never so decided and that the matter is of such importance that it should be decided by this Court.

First: This Court has consistently recognized that consent of a nonresident to the jurisdiction of a foreign court confers valid *in personam* jurisdiction, consistent with the due process clause of the Fourteenth Amendment. [*E.g. Western Life Indemnity Co. v. Rupp*, 235 U. S. 261 (1914); *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 237 (1900).] This Court has also repeatedly upheld the validity of service of process on a non-resident by serving a designated agent of the nonresident within the foreign state. [*E.g. Perkins v. Benguet Consol. Min. Co.*, 342 U. S. 437 (1952).] In similar fashion, it has become elementary constitutional law that a non-resident individual doing business in the foreign state through agents subjects himself to service of process upon said agents in connection with claims stemming from the transaction of business in the foreign state. [*Doherty & Co. v. Goodman*, 294 U. S. 623 (1935); *Sugg v. Hendrix*, 142 F. 2d 740 (5th Cir., 1944).]

The rationale of *Doherty* substantially controls the present question. In that case, the nonresident was

found by this Court not to have consented in terms to service of process on his agent in the foreign state. Nevertheless this Court held that the Iowa statute provided for an involuntary appointment by the nonresident of the agent as an agent for service of process. *A fortiori,* where the nonresident voluntarily and without the compulsion of statute designates an agent for service of process in the foreign state, as in this case, the validity of the designation and the consensual submission to jurisdiction is overwhelming. This Court has even recognized that the Fourteenth Amendment permits a State to convert a voluntary special appearance to challenge jurisdiction into an involuntary general appearance in the case. [*York v. Texas,* 137 U. S. 15 (1890).]

The constitutional propriety of the voluntary designation of an agent for service of process by an individual is recognized by Rule 4(a)(1) of the Federal Rules of Civil Procedure, which provides that service may be accomplished "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." "No question of due process arises with respect to service upon an agent of an individual in such a situation." [2 Moore, Federal Practice §4.12, (2d Ed. 1960).] The Federal courts have repeatedly upheld the validity of service upon an agent for service of process voluntarily appointed by an individual. [*E.g. Emerson Radio & Ph. Company v. Callander Distrib. Corp.,* 116 Fed. Supp. 926, 927 (S. D. N. Y. 1953) ("In fact, the provision is perfectly proper for it is no more than a consent to the appointment of an agent for the service of process in New York. And such agreements have been sustained consistently."); *Davis v. Smith,*

126 Fed. Supp. 497 (E. D. Pa. 1954), aff'd 253 F. 2d 286, 289 (3rd Cir. 1958); *Kenny v. Alaska Airlines*, 132 Fed. Supp. 838, 843 (S. D. Cal. 1955).]

Second: Contractual consent provisions have been uniformly upheld in all jurisdictions where the issue has been raised. We have been unable to find a single case that has questioned in the slightest the validity of such provisions. The controlling case in California is *Frey & Horgan Corp. v. Superior Court*, 5 Cal. 2d 401, 55 P. 2d 203 (1936) cert. den. 298 U. S. 684 (1936). [See also *Mulcahy v. Whitehall*, 48 Fed. Supp. 917, 919 (D. Mass. 1943); *Gilbert v. Burnstine*, 255 N. Y. 348, 174 N. E. 706 (N. Y. Ct. App. 1931); *Withers v. Starace*, 22 Fed. Supp. 773 (E. D. N. Y. 1938); *Marvlo Fabrics, Inc. v. Jarus*, 87 Fed. Supp. 245 (W. D. Mo. 1949).]

Third: The Restatement of Judgments and the Restatement of Conflict of Laws unqualifiedly recognize the validity of contractual consent provisions.* The authoritative text-writers are uniformly in accord. "A person may consent in advance to jurisdiction of the

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*The *Restatement of Judgments* expresses the controlling principles as follows:

"§18. CONSENT.

"A court may acquire jurisdiction over an individual if he consents to the exercise of jurisdiction over him.

"Comment:

* * * *

"c. Consent before action brought. A person may agree that if an action is brought against him the court shall have jurisdiction over him, even though he is not served with process in the action. Thus, in a contract made between the plaintiff and the defendant it may be provided that in any action brought upon the contract in a particular State service of process may be made upon the defendant in a manner provided for by the terms of the contract, as, for example, by mail or by service outside the State in which the action is brought. In such a case if service is made in the manner

Courts in a State where he is not present or domiciled." [Goodrich, Conflict of Laws, p. 198 (3d Ed. 1949); Stumberg, Conflict of Laws, p. 81 (2d Ed. 1951).]

Fourth: By hypothesis, jurisdiction of the California courts over petitioners was acquired by their consent. That being the case, no question of due process is involved because California has not sought to assert its jurisdiction over petitioners involuntarily. Due process in this context involves the involuntary deprivation of rights or property. Where the deprivation is voluntary, no question of due process properly arises.

Fifth: As we have already seen, petitioners deferred until now any claim under the Fourteenth Amendment to the Constitution of the United States with reference to the validity of the contractual consent

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agreed upon, it is sufficient to subject the defendant to the jurisdiction of the court.

"d. Designation of agent to accept service of process. A person may designate an agent upon whom service of process may be made in any action which may be brought against him . . . If he does appoint such an agent, service of process upon the agent subjects him to the jurisdiction of the court."

The *Restatement of Conflict of Laws* contains similar provisions:

"§81. JURISDICTION BY CONSENT.

"A state can exercise through its courts jurisdiction over an individual who consents to such exercise of jurisdiction.

"Comment:

* * * *

"b. Consent may be given with respect to a particular action either after the action has been brought or before the action has been brought; or it may be given generally with respect to actions which may thereafter be brought."

provisions. For reasons already noted [See pages 16-17, *supra*] they may not now ask this Court to review the California decision on constitutional grounds.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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